TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 75

GWIN, WHITE & PRINCE, INC., APPELLANT,

vs.

HAROLD H. HENNEFORD, THOMAS S. HEDGES AND T. M. JENNER, CONSTITUTING THE STATE OF WASHINGTON TAX COMMISSION

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED MAY 31, 1938.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 20, 1938.

—8018

[fol. 1] [File endorsement omitted]

IN SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 16434

GWIN, WHITE & PRINCE, INC., a Corporation, Plaintiff,

vs.

HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Constituting the State of Washington Tax Commission, Defendants

COMPLAINT—Filed February 3, 1937

Comes now the plaintiff, and for cause of action against the defendant alleges as follows, to-wit:

I

That the plaintiff is a corporation organized under the laws of the State of Washington, having its place of business in Seattle, King County, Washington, and that it has paid its last due annual license fee as required by law and is duly qualified to do business within the State of Washington, and to sue and be sued in the courts thereof.

II

That the defendants, Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, constitute the Tax Commission of the State of Washington, and as such have in charge the enforcement of the collection of taxes accruing to the State of Washington under the so-called Business and Occupation Tax as enacted by the Legislature of the State of Washington and approved by the Governor March 25, 1935, as set forth in Title II of Chapter 180 of the 1935 Session Laws of the State of Washington.

III

That the plaintiff, acting solely as agent for various grow-
[fol. 2] ers and grower organizations in the States of Washington and Oregon is engaged in the business of marketing apples and pears produced in the said States of Washington and Oregon and in making deliveries of fruit so sold, col-

lecting the sales price and remitting the net balance thereof to said growers and grower organizations. That plaintiff has taken out no license as a commission merchant under the laws of the State of Washington.

IV

That all of the sales of fruit made by the plaintiff are made in the course of interstate and foreign commerce save and except an occasional sale of a small quantity of fruit sometimes made within the State of Washington. That with the foregoing insignificant exception all of the fruit sold by the plaintiff is shipped and delivered outside of the state of Washington to purchasers who are non-residents of the State of Washington, said fruit going to all parts of the United States and a very large portion thereof to foreign countries.

V

That as a part of plaintiff's business it has sales representatives in very many points outside of the State of Washington, who, on behalf of the plaintiff, negotiate said sales and on approval of the plaintiff of the same execute in said points outside of the State of Washington and on behalf of the plaintiff written contracts of sale. That also as a part of its business plaintiff during the fruit season, which extends over a large portion of the calendar year, sends to its aforesaid representatives outside of the State of Washington daily bulletins listing cars of fruit, some of which are at the time either stored outside the State of Washington or are already moving in cars in interstate commerce. That in conducting its aforesaid business and in making said sales, all of which, both as to origin and completion, are interstate or foreign commerce, plaintiff expends very large sums of money in telephone, telegraph and cable communications, all in interstate and foreign commerce. That [fol. 3] as a further part of its business, plaintiff handles the bills of lading on all shipments made in compliance with the contracts of sale entered into in foreign and extra-state territory, most of said shipments being consigned to the plaintiff at extra-state points, and that through its foreign and extra-state representatives plaintiff attends to the delivery of said shipments and collects the proceeds therefrom, which are thereafter forwarded to the plaintiff

at Seattle, Washington, all in the course of interstate and foreign commerce.

VI

That approximately one-quarter of all the fruit sold and handled by the plaintiff, both as to quantity and value, is grown in and shipped from the State of Oregon, none of which ever enters the State of Washington.

VII

That the business of the plaintiff, as hereinbefore set forth, constitutes all its business, and that the same, both as to the inception and completion of said sales and the delivery of said fruit, consists of interstate and foreign commerce, and that the plaintiff's income is wholly derived from such interstate and foreign commerce.

VIII

That the said defendants constituting and acting as the Tax Commission of the State of Washington have ruled and assert that plaintiffs come within the purview of Title II of Chapter 180 of the Laws of 1935 aforesaid, and are liable for the payment of an occupation tax upon the business done by them. That the defendants, as such Tax Commission, are demanding of the plaintiff that it pay to said Tax Commission a business or occupation tax upon the plaintiff's gross revenue derived from the business done by the plaintiff and are threatening the enforcement of the collection thereof, and will subject the plaintiff to penalties [fol. 4] provided in said act in case of its failure to so pay. That unless the defendants are restrained from enforcing said business tax against the plaintiff, they will interfere with plaintiff's business, will subject the plaintiff to prosecution under the provisions of said act, and do the plaintiff irreparable harm and injury.

IX

That the enforcement of the collection of said business tax by the defendants against the plaintiff is in violation of the Commerce Clause of the Constitution of the United States and constitutes an illegal interference with interstate and foreign commerce in contravention of the laws of the United States, and constitute an import or duty on

exports in violation of Sec. 10 Act I of the Constitution of the United States.

X

That the plaintiff has no plain, speedy or adequate remedy at law and that its only remedy is in a court of equity by the issuance of a restraining order, restraining and enjoining the defendants and all persons acting by, through or under them from enforcing the collection of the tax which they are seeking to impose upon the plaintiff, and that it is necessary that the defendants be so enjoined and restrained to prevent said loss and damage as aforesaid.

Wherefore, plaintiff prays as follows:

(1) For judgment and decree of this court perpetually enjoining and restraining the defendants and all persons acting by, through or under them from enforcing or attempting to enforce the provisions of said Title II of Chapter 180 of the Session Laws of 1935 against the plaintiff, and from collecting or attempting to collect a business or occupation tax from the plaintiff, and from in any wise interfering with plaintiff's business, or taking any action against the plaintiff for failure to comply with the provisions of said act.

[fol. 5] (2) That it be accorded such other relief as to the court may seem meet and equitable.

Bayley & Croson, Attorneys for Plaintiff.

Duly sworn to by A. A. Prince. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 6] [File endorsement omitted]

IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

STIPULATION AS TO DECISION, ETC.—Filed January 14, 1937

It is stipulated by and between counsel for respective parties to this action that the court may decide this case on the merits on defendants' demurrer together with additional facts herein stipulated.

It is further stipulated that plaintiff, Gwin, White & Prince, Inc., transacts its entire Washington State business under a written contract with the Wenatchee-Okanogan Cooperative Federation which is an organization representing approximately twelve cooperative growers' organizations in the state of Washington, and that a full, true and correct copy of said contract is hereto attached, marked Exhibit A.

Witness our hands this 6th day of January, 1937.

G. W. Hamilton, Attorney General; E. P. Donnelly, Assistant Attorney General, Attorneys for Defendants. Bayley & Croson, Attorneys for Plaintiff.

[fol. 7] (Copy)

EXHIBIT "A" TO STIPULATION

Contract

This Agreement, made and entered into in duplicate on this — day of ——, 1933, by and between Wenatchee-Okanogan Cooperative Federation, a corporation of Wenatchee, Washington (hereinafter for brevity called Federation) as party of the first part, acting for its members, and Gwin, White & Prince, Inc., a corporation of Seattle, Washington (and hereinafter for brevity called Agency), as party of the second part:

Witnesseth:

In consideration of the Mutual Agreements herein contained, Federation hereby appoints Agency its exclusive agent to sell and collect the proceeds from sales of all commercially packed apples and pears which shall come into possession of or control of Federation as agent for its members, during the continuance of this contract.

Term of Existence.—This contract shall be in full force and effect for the term of one year from and after the date hereof and shall automatically continue for succeeding terms of one year each, unless and until, on or before March first of any year term, either party hereto shall notify the other party, in writing, of its desire to terminate this contract at the end of the then one year period, and such notice shall constitute a termination at the end of said period. However, such termination shall not become effective until

all indebtedness which may then be owing by Federation or any of its members to Agency shall have been paid. In the event that Agency shall be under any contingent liabilities with respect to Federation or any of its members when such notice is served, termination shall be delayed until Federation shall furnish an indemnity bond in amount and with surety satisfactory to Agency, and the contract shall then terminate.

It is specifically understood and agreed by each of the parties hereto as follows:

Federation Agrees:

1. To harvest, clean and pack such products at the proper stage of maturity and in first class manner and shipping condition, and to protect them from damage by exposure to sun, wind or frost; to establish grading rules which shall be mutually satisfactory to Federation and Agency and to cause all products under its control to be graded strictly in accordance therewith, and for the purpose of carrying out the foregoing to maintain an efficient system of inspection.

2. Thoroughly to inspect all equipment tendered by common carriers for loading; to accept only such equipment as is in proper physical condition and of capacity safely to permit loading up to the minimum prescribed in carrier's tariff; at such times as directed by Agency to deliver products free on board cars at shipping stations after inspection, approval and acceptance of such equipment to line cars with paper, and equip them with temporary or permanent false floors if required by carriers, and to conform to any other requirements of common carriers.

[fol. 8] 3. To load cars in a careful manner, stripping and bracing each load with good sound lumber, in accordance with the official standards of the carriers, or in accordance with standard loading specifications of Agency; to ship all cars to points and consignees designated by said Agency. Federation hereby delegates to Agency the right of diversion in transit.

4. To guarantee to the initial carriers all freight and other transportation charges, and, if required, to furnish initial carriers with bond or other surety satisfactory to the carrier; also, if required by the carrier, to prepay transportation charges. To guarantee and be responsible

for transportation charges on unused ocean steamship space where engagement of said space has been authorized or confirmed through Agency by Federation or any of its members.

5. To deliver to Agency immediately after shipment of each car billed thereto or pursuant to its instructions, the original Bill of Lading and one carbon copy thereof, and a complete manifest in quadruplicate; also a comprehensive signed inspection report, all on Agency's standard forms. Also to advise Agency by wire, if required by it, of shipment of all cars and the contents thereof.

6. To furnish Agency from time to time with such general and detailed estimates of prospective crops and shipments as Agency may require and to furnish weekly (or oftener if requested), a detailed inventory of the products on hand at each shipping point, or other wise available for sale.

7. Promptly to report to Agency by wire, all offers for cash or otherwise, which may be received by said Federation or any of its members, and further to refer all such offers to Agency for negotiation, consummation, invoice and collection.

8. To assume the expense of any terminal or transit inspections made by United States Department of Agriculture's Inspection Service at the direction of Agency in the protection of Federation's interests where contents of car arrive damaged, where alleged to be not up to grade or pack, where necessary at ports of embarkation to complete the documentation of export sales, or where otherwise necessary or advisable in the judgment of the Agency.

Agency Agrees:

1. To sell said products free on board cars at shipping station, in transit or delivered, but so far as possible and advisable on the basis of free on board cars at shipping station.

2. To effect the widest possible distribution of the products so far as advisable and consistent with securing the highest net returns and to that end vigorously and intensively to cultivate and develop domestic and foreign markets.

3. To use its best efforts to the end that the route between producer and consumer is shortened by the elimination of waste, avoidance of unnecessary middlemen, and the education of the legitimate wholesale and retail trade, thereby increasing the returns to the producer.

4. To keep Federation and its members duly informed of market conditions and changes therein, from time to time.

[fol. 9] 5. At all times during business hours to permit any authorized officer or representative of Federation or any of its members to inspect any of its books, records and accounts pertaining to shipments, moneys or any other items in which Federation or any of its members has legitimate interest.

6. When shipments are properly billed to Agency or its order, sales made by Agency, invoiced by it, and in all respects handled throughout by Agency and actually delivered to purchaser, Agency shall be responsible to Federation for the collection and payment to the Federation of the sales proceeds thereof, Provided, however, that Agency's responsibility hereunder shall not be taken to include allowances made to overcome rejections or to adjust reasonable claims, nor shall Agency's responsibility include failure or default of any bank or banker connected with or participating in the handling, collection or remittance of funds belonging to the Federation or any of its members.

7. Through its Traffic Department to assist Federation in all matters pertaining to transportation services; specifying correct routings and cooperating with the carriers in facilitating the prompt and safe transit of cars through to final destinations.

8. To cooperate with Federation and other representatives of the industry, in all reasonable efforts for the creation and maintenance of equitable transportation rates, and improvement of transportation services.

9. To provide the facilities of its Claim Department in the prosecution of claims for overcharge or loss or damage resulting from negligence or error on the part of any participating common carrier, as hereinafter provided.

10. So far as practicable, equitably and impartially to prorate to the several members of the Federation all "open orders" (orders in which the buyers do not specifically

nominate labels) in accordance with the detailed estamates and inventories furnished Agency by Federation and its members.

11. That Agency will not engage in any speculative business in fruits either directly or indirectly. Failure to strictly comply with the terms of this paragraph, with or without the breach of any other part of this contract, will be sufficient grounds for cancellation of this contract.

It is further mutually understood and agreed by both parties hereto as follows,

1. The general sales policy in the disposition of fruit covered by this contract shall be based on sound principles of gradual, seasonal, orderly marketing, with due regard to the timely liquidation of bank loans and other obligations as early as may be consistent with the security of maximum market values.

2. The Federation and its members shall have the exclusive right and authority, consistent with (1) above, (except as hereinafter provided) to fix the price at which its or their products may be sold by the Agency, but in event the price so determined shall be higher than the best market price reasonably obtainable, Agency shall not be held responsible for failure to negotiate sales at such prices. Failure by the Federation or its members to determine specific prices and so advise Agency at time of shipment (or prior to sale of tramp car or cars in storage at other than shipping points) will be the authority for Agency to sell or dis- [fol. 10] pose thereof at the best prices and terms reasonably obtainable.

Provided, However, that in recognition of the fact that Agency is under certain contractual fiduciary obligations to the Wenoka Credit Corporation and its bankers and assigns, in the event of conflict of judgment as between Federation (or any of its members) and the Agency with respect to the wisdom of any certain proposed sale or sales, the judgment of Agency shall prevail, so long as Federation or its members concerned in any such transaction shall be indebted to the Wenoka Credit Corporation, its bankers or assigns. When the Federation or the member concerned shall have discharged all indebtedness with respect to the collection and remittance of which the Agency is legally or morally responsible, then and in that event the right and

authority to pass upon sales shall vest exclusively in Federation or its members.

3. Upon consummation of sales and receipts of proceeds thereof, the latter shall be deposited by Agency in a separate fund, entitled Gwin, White & Prince, Inc., Trustee.

Agency shall, promptly on receipt of sales proceeds, withdraw from the trustees fund all charges due it from Federation for services rendered and expenses incurred in Federation's behalf, and also all moneys owing by Federation or any of its members on notes or advances, to the Wenoka Credit Corporation or its assigns, and pay the same to the person entitled thereto.

Provided however, that proceeds from sales of fruit shipped by any particular member of Federation shall only be applied toward the retirement of the indebtedness of that member.

Agency shall disburse the balance of the net proceeds as promptly as possible to Federation, or its order.

4. Unless otherwise expressly authorized or directed by the Federation all sales shall be made on the current market. In the event of products being placed in distant cold-storage, pursuant to instructions of, or with the consent of Federation (and by "distant" is meant any storage point outside this immediate district) Federation authorizes Agency to deduct from sales proceeds the expenses actually connected with storage and inspection.

5. When any sale is made by Agency and confirmed by Federation or a member, Federation and member agree to hold Agency harmless against all expense or loss suffered by Agency, either by reason of failure to deliver the order so confirmed, to live up to the specifications of order, or otherwise to effect good delivery, thus causing rejections, adjustments, allowances, reclamations or necessitating resales.

6. In the event of rejection of shipments or other emergency which, in the judgment of Agency may demand immediate action on its part in order properly to protect the interest of Federation, Agency is hereby authorized to take such immediate action as it may deem necessary in the premises, and to notify Federation of the action taken.

7. Agency is hereby authorized and directed by Federation to prosecute all claims against common carriers, pub-

lic utilities and others, Agency in these circumstances acting as agent of Federation, which hereby agreed to pay therefor the charges hereinafter specified.

[fol. 11] 8. That Agency will endeavor to audit carriers' expense bills in all cases where legal liability may attach to Federation and if proper legal transportation charges have not been made, or reasonable doubt exists that there is an undercharge the known or estimated amount thereof may be withheld by Agency from any remittance due Federation until investigation discloses the fact and amount of such omission or undercharge, whereupon Agency shall refund any amount unnecessarily withheld to the person entitled thereto.

9. It is contemplated that all manifests, inspection reports, crop estimates and other date required by Agency or by the Wenoka Credit Corporation or its assigns shall be made out on standard forms approved by Agency and the Wenoka Credit Corporation.

10. The Agency shall bear the expense of all Telegraph and Telephone messages sent by either party hereto to the other.

11. Inasmuch as the remedy at law would be inadequate, and as it is now, and ever will be impracticable and extremely difficult to determine the actual damage resulting to Agency should Federation violate the exclusive selling authority hereby granted to Agency by disposing of its products, or any part thereof, in a manner not specifically provided in this agreement, said Federation hereby agrees to pay to Agency for all products delivered, sold, consigned, or marketed by or for its otherwise than through Agency as herein provided for, as liquidated damages for such breach of contract, an amount equal to the fees Agency would have received had the sales been made by it, said amount to be immediately due and payable upon completion of sale, but said damages shall not be in derogation of any other rights given Agency under this contract.

The Covenants and Agreements in this contract set forth shall be binding not only upon the parties hereto, but also upon their respective personal representatives, successors, or assigns, and upon all members of Federation.

In Consideration of the services to be rendered by Agency according to the provisions above set forth, Federation shall pay to Agency, and the latter is authorized to deduct from the proceeds of sales made, the following compensation, viz.:

Apples in standard boxes, eight cents ($.08) per box.
Pears " " " ten cents ($.10) " "

Provided Further, That on all cars sold to which attach brokerage, diversion demurrage, icing, storage or other charges not properly payable by the purchaser, or that in the event of cars being broken up and sold in less-carload parcels at destination; cars being exported or cars sold delivered, all transportation, icing, selling, auction, dock, carting, seaboard forwarding and other actual out-of-pocket expenses shall be first deducted from the proceeds of any such sale and no part of such expense shall be borne by Agency out of its service revenues.

Claim Collection.—Prosecution of claims against common carriers or public utilities shall be at Agency's expense, free of charge to Federation. Provided, however, that in the event lawsuit or other extraordinary procedure is necessary to effect collection of particular claims, the actual cost thereof shall be a charge against the proceeds and be deducted therefrom. And provided further that no lawsuit or other extraordinary procedure shall be undertaken by Agency unless or until Federation shall first give its consent. In the event any such authorized litigation be unsuccessful, Federation will pay the actual cost thereof.

[fol. 12] In Witness Whereof, said parties have executed this instrument in duplicate the day and year first above written.

Wenatchee-Okanogan Cooperative Federation, by —— ——, President.

Attest: —— ——, Secretary.

Gwin, White & Prince, Inc., by —— ——, President.

Attest: —— ——, Secretary.

[fol. 13] IN SUPERIOR COURT OF THURSTON COUNTY

[Title omitted]

DEMURRER—Filed January 14, 1937

Come now the above entitled defendants and demur to plaintiff's complaint on the ground and for the reason:

I

That the same does not contain facts sufficient to constitute a cause of action.

G. W. Hamilton, Attorney General; E. P. Donnelly, Assistant Attorney General, Attorneys for Defendants.

Copy received 1-12-37. Bayley & Croson.

[File endorsement omitted.]

[fol. 14] IN SUPERIOR COURT OF THURSTON COUNTY

No. 16434

GWIN, WHITE & PRINCE, INC., a Corporation, Plaintiff,

vs.

HAROLD HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Constituting the State Tax Commission, Defendants

MEMO OPINION—Filed April 19, 1937

I have very carefully considered the authorities cited by counsel and still feel that the question is a very close one. I am of the opinion that the defendants' demurrer should be sustained, not upon the ground that the plaintiff is not engaged in interstate commerce, but upon the ground that it is a domestic corporation and that the tax levied is not a tax upon interstate commerce but upon the privilege of the domestic corporation to exist in the state.

(Signed) D. F. Wright, Judge.

[File endorsement omitted.]

[fol. 15] In Superior Court of Thurston County

[Title omitted]

Order Sustaining Demurrer—Filed May 26, 1937

This matter coming on regularly for hearing on defendants' demurrer to plaintiff's complaint, the plaintiff appearing by Messrs. Bayley and Croson, their counsel, and defendants appearing by the Hon. G. W. Hamilton, Attorney General of the State of Washington, and Hon. E. P. Donnelly, Assistant Attorney General, and the court having listened to the argument of counsel and having considered the written briefs filed by counsel and having on the 20th day of April, 1937, handed down its memorandum opinion to the effect that defendants' demurrer should be sustained, Now, Therefore,

It is by the Court Ordered, Adjudged and Decreed that defendants' demurrer to plaintiff's complaint be and it hereby is sustained, to all of which the plaintiff excepts and its exception is hereby allowed.

Done in Open Court this 26th day of May, 1937.

D. F. Wright, Judge.

[File endorsement omitted.]

[fols. 16-17] [File endorsement omitted]

In Superior Court of Thurston County

No. 16434

Gwin, White & Prince, Inc., a Corporation, Plaintiff,

vs.

Harold Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the State Tax Commission, Defendants

Judgment—Filed May 26, 1937

This matter coming on regularly for hearing on defendants' demurrer to plaintiff's complaint, the plaintiff appearing by Messrs. Bayley & Croson, their counsel, and defendants appearing by the Honorable G. W. Hamilton,

Attorney General of the State of Washington, and Honorable E. P. Donnelly, Assistant Attorney General, and the court having listened to the argument of counsel and having considered the written briefs filed by counsel and the stipulation between the parties that the state makes no claim to the tax upon the Oregon business of plaintiffs, even though it clears through plaintiff's Seattle office and the court having considered the regular contract under which plaintiff does business, which, by stipulation of the parties was to be considered by the court as an agreed statement of fact, and plaintiff having elected not to amend its complaint, but to stand thereon as supplemented by said agreed statement of fact, and the court being of the opinion that the business of plaintiff, originating in the State of Washington, is taxable, Now, Therefore,

It is by the Court Ordered, Adjudged and Decreed that the prayer of plaintiff's complaint be and the same hereby is denied and that this action be and it hereby is dismissed with statutory costs to be taxed. To all of which the plaintiff excepts and its exception is hereby allowed.

Done in open court this 26th day of May, 1937.

D. F. Wright, Judge.

[fol. 18] In Superior Court of Thurston County

[Title omitted]

Notice of Appeal—Filed June 10, 1937

To Harold Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the State Tax Commission, and G. W. Hamilton, Attorney General:

You, and each of you, are hereby notified that the plaintiff, Gwin, White & Prince, Inc., a corporation, feeling itself aggrieved, does hereby appeal to the Supreme Court of the State of Washington from that certain judgment made and entered herein by the Court on May 26, 1937, wherein and whereby the prayer of the plaintiff's complaint was denied and the action dismissed with costs of suit.

Dated at Seattle, Washington, this 9th day of June, 1937.

Bayley & Croson, 900-906 Insurance Building, Seattle, Washington, Attorneys for Plaintiff.

Copy of the foregoing Notice of Appeal received and service admitted this 10th day of June, 1937.

E. P. Donnelly, Asst. Atty. Genl., Attorneys for Defendants.

[fol. 19] [File endorsement omitted.]

[fol. 20] In Supreme Court of Washington

Assignments of Error—Filed August 13, 1937

(Part of Page 10 and Part of Page 11, Brief of Appellant)

1. The trial court erred in sustaining the demurrer of the respondents to appellant's complaint.

2. The trial court erred in denying the prayer of the appellant's complaint and dismissing said complaint.

3. The trial court erred in holding that the imposition and collection from the appellant of the Business and Occupation Tax does not impose a burden upon interstate and foreign commerce in violation of the Commerce Clause of the Constitution of the United States, and that the imposition of said tax upon appellant does not violate Article 1, Section 9, Clause 5, and Article 1, Section 10, Clause 2 of the Constitution of the United States as being an impost or duty on exports.

4. The trial court erred in failing to overrule the respondents' demurrer and in failing to find for the appellant on its complaint.

[File endorsement omitted.]

[fol. 21] IN SUPREME COURT OF WASHINGTON

No. 26793

GWIN, WHITE & PRINCE, INC., a Corporation, Appellant,

vs.

HAROLD H. HENNEFORD et al., Constituting the Tax Commission of the State of Washington, Respondents.

ORDER SETTING CAUSE FOR REHEARING EN BANC—Filed November 29, 1937

It is Ordered that the above-entitled cause be assigned for rehearing en Banc during the first week of January, 1938.

Dated this 29th day of November, 1937.

By the Court.

Wm. J. Steinert, Chief Justice.

[File endorsement omitted.]

[fol. 22] IN SUPREME COURT OF WASHINGTON, EN BANC

No. 26793

GWIN, WHITE & PRINCE, INC., a Corporation, Appellant,

v.

HAROLD H. HENNEFORD, THOMAS S. HEDGES, and T. M. JENNER, Constituting the State of Washington Tax Commission, Respondents.

OPINION—Filed February 9, 1938

This action was instituted by Gwin, White & Prince, Inc., a domestic corporation of Seattle, to restrain the state tax commission from enforcing against the plaintiff the provisions of title II, ch. 180, L. 1935, for collection of a business or occupation tax from all persons engaged in business activities in the State of Washington. The appeal is from the judgment of dismissal rendered after a demurrer had been sustained to the complaint.

The facts presented by the allegations of the complaint, which are admitted by the demurrer to be true, and the stipulation of the parties, are in substance as follows: The appellant, acting solely as agent of various growers and grower organizations in Washington and Oregon, is engaged in the business of marketing apples and pears produced in Washington and Oregon and in making deliveries of fruit so sold. The growers and grower organizations have the exclusive authority to fix the price at which their or its products may be sold by appellant who is required to collect the sales price of fruits sold and to deposit the [fol. 23] proceeds of the sales in a separate fund entitled "Gwin, White & Prince, Inc., Trustee." From this fund appellant deducts its charges as fixed by the contract of the appellant with the growers and pays the balance to the contracting organization. Appellant transacts its entire business originating in the state of Washington under a written contract with the Wenatchee-Okanogan Co-Operative Federation made up of approximately twelve co-operative associations in this state. Under the terms of that contract appellant is the exclusive agent of the federation to sell and collect the proceeds from sales of all commercially packed apples and pears which come into the possession or control of the federation as agent for its members. By that contract the appellant is obligated to sell the fruit and to obtain the widest possible distribution of same, to inform the federation and its members as to marketing conditions, to be responsible for collections on all sales made by appellant on all shipments where the bill of lading runs to appellant or its order, to handle all traffic matters pertaining to shipments and to attend to the collection of claims against carriers or others. The compensation to be paid to appellant for its services under the contract is eight cents a box for apples and ten cents a box for pears. Except for an occasional sale of a small amount of fruit made within this state, all of the fruit sold is shipped to points outside the state of Washington; that is, the fruit is shipped to other states and to foreign countries. In the conduct of its business as agent for the fruit growers, the appellant maintains sales repre- [fol. 24] sentatives in many points outside of the state of Washington, both within the United States and in Europe, whose duty is to negotiate sales, and who execute written contracts of sale in appellant's name and on its behalf at

their respective places of business outside of the state of Washington.

As a part of its business, the appellant sends to its representatives outside of this state daily bulletins listing cars of fruit which are for sale. The appellant gives shipping directions to the respective growers and sellers and handles all of the bills of lading on shipments, most of which are consigned to appellant at points outside of this state. Upon arrival of the fruit at its destination, appellant attends to the delivery of shipments and collection of the proceeds therefrom.

Upon the ground that it is acting only as an agent for the fruit growers and that it is engaged solely in interstate commerce, appellant has never taken out a license under the commission merchants law of this state. The state tax commission's demand for payment of a business or occupation tax upon the appellant's gross revenue (commission of eight cents a box for apples and ten cents a box for pears) derived from the business done by the appellant under its contract as agent of the fruit growers was rejected. That is, the state tax commission's claim of a tax liability on the total commissions appellant receives from the growers for Washington-grown fruit sold and shipped to points within and without this state was denied. Appellant's action to restrain the state tax commission from enforcement of the [fol. 25] occupation tax statute resulted, as stated above, in dismissal of the action following sustaining of demurrer to the complaint.

Appellant contends that the imposition of the occupation tax upon it constitutes a direct impost upon the gross proceeds of appellant's foreign and interstate business; therefore, is in violation of article I, § 9, clause 5, and article I, § 10, clause 2, of the constitution of the United States, reading as follows:

"* * * No tax or duty shall be laid on articles exported from any state; * * *

"No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; * * *"

All persons engaged in business in this state are required by title II, ch. 180, L. 1935, to pay an occupation tax for the act or privilege of engaging in business activities.

The tax is measured by a percentage of the gross income solely of that business. In the case at bar the tax is measured by a percentage of the appellant's gross income, consisting of the commissions of eight cents a box for apples and ten cents a box for pears produced in the state of Washington and sold and shipped to points within and without this state. The tax which the state tax commission seeks to exact of the appellant is a tax laid for the purpose of revenue only and is measured, not by the sales price of the fruit, but by the amount received by the appellant for its services as the exclusive agent of the growers fixed on a "per box" basis.

The United States Supreme Court held in Crew Levick Company v. Pennsylvania, 245 U. S. 292, that a state tax [fol. 26] on the business of selling goods in foreign commerce measured by a percentage of the entire business transacted is both a regulation of foreign commerce and an impost, or duty on exports, and is, therefore, void.

"There is no question that the state may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a state cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination . . . ." Cooney v. Mountain States Telephone & Telegraph Co., 294 U. S. 384.

The appellant may not successfully invoke the rule that if a contract of sale requires transportation across state lines the connection is so close as to render the sale itself immune from taxation. In the case at bar we are not dealing with a sale, but with a contract of agency—a contract for services to be rendered by appellant for the fruit growers.

The occupation tax is imposed upon all persons for the privilege of engaging in business activities in this state. The appellant is a domestic corporation operating, entirely within this state, a business which is exclusively with his principals, certain fruit growers; and for its services to its principals the appellant is paid a commission as recited above. The tax imposed upon the appellant is not upon imports or exports or interstate or foreign commerce. Ap-

pellant is not a necessary factor in such commerce. Appellant renders an independent service—engages in a business within this state—which is advantageous to those who form a component part or link in such commerce, but that does not render invalid the imposition of the occupation [fol. 27] tax as it is not in conflict or inconsistent with the Federal constitution.

In Ficklen v. Shelby County Taxing District, 145 U. S. 1, it was held that a license tax measured by gross commissions imposed on factors and brokers buying or selling on commission as applied to a commission merchant who negotiated sales on behalf of principals residing in other states with respect to goods located in other states was valid. The court stated that the tax was clearly levied upon the complainants in respect to the general commission business they conducted and not on the principal of the complainants. The court said:

"No doubt can be entertained of the right of a state legislature to tax trades, professions and occupations, in the absence of inhibition in the state constitution in that regard; and where a resident citizen engages in general business subject to a particular tax the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants, of goods situated in another State, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution • • •

"This tax is not on the goods, or on the proceeds of the goods, nor is it a tax on non-resident merchants; and if it can be said to affect interstate commerce in any way it is incidentally, and so remotely as not to amount to a regulation of such commerce."

In Crew Levick Company v. Commonwealth of Pennsylvania, 245 U. S. 292, cited above, Ficklen v. Shelby County Taxing District, 145 U. S. 1, was distinguished, and in the course of its opinion the court said:

"• • • Besides, *the tax imposed* in the *Ficklen Case was not* directly *upon the business* itself or *upon the volume* thereof, *but upon the amount of commissions earned* by the brokers, which, although probably corresponding with the volume of the transactions, was not necessarily proportionate thereto. For these and other reasons the case has been deemed exceptional." (Italics ours.)

In American Manufacturing Company v. City of St. Louis, 250 U. S. 459, the court had under consideration an ordinance conditioning the right to manufacture goods within the city upon payment of a license tax computed upon [fol. 28] the amount of the sales of the goods. It was contended that the ordinance, in effect, imposed a tax on sales of goods in the course of interstate commerce. In holding that the ordinance did not impose a tax on sales, the court said:

"* * * No tax has been or is to be imposed upon any sales of goods by plaintiff in error except goods manufactured by it in St. Louis under a license conditioned for the payment of a tax upon the amount of the sales when the goods should come to be sold. The tax is computed according to the amount of the sales of such manufactured goods, irrespective of whether they be sold within or without the State, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the City of St. Louis.

"There is no doubt of the power of the State or of the city acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing business in the city. Unless some particular interference with federal right be shown, the States are free to lay privilege and occupation taxes."

We do not agree with the argument, that as sales of Washington fruit for delivery without the state made directly by appellant's principals are immune from the tax in question, appellant is entitled to the same immunity as it is merely a local agent for growers and associations in this state who have fruit to be sold. If those fruit growers and associations choose to make sales through the medium of an agent or independent contractor, as in the case at bar, the agent's or contractor's activities in this state in making and promoting the sales are subject to state taxation like any other local business.

Counsel for appellant cite as sustaining authority Puget Sound Stevedoring Company v. The Tax Commission of the State of Washington, 189 Wash. 131, 63 P. (2d) 532, 82 L. Ed. 64, — U. S. —. In that case we sustained, against the protest of the taxpayer that an unlawful burden was [fol. 29] imposed thereby upon interstate and foreign com-

merce, a tax laid upon the business of a stevedoring company, the amount of the tax being measured by a percentage of the gross receipts of the stevedoring company. The United States Supreme Court reversed our decision on the ground that the taxpayer was actually engaged in interstate commerce. The court said:

"The fact is stipulated, however, that no matter by whom the work is done or paid for, 'stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the "first place of rest", and vice versa.' In such circumstances services beginning or ending in the hold or on the dock stand on the same plane for the purposes of this case as those at the ship's sling. The movement is continuous, is covered by a single contract, and is necessary in all its stages if transportation is to be accomplished without unreasonable impediments. The situation thus presented has no resemblance to that considered in Pennsylvania R. R. Co. v. Knight, 192 U. S. 21, 26 where an interstate railroad furnished its passengers with taxicab service to and from its terminus, the service being 'contracted and paid for independently of any contract or payment for strictly interstate transportation.' The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts."

Clearly, the citation is inapplicable.

The tax imposed in the case at bar is not directly upon the business itself or upon the volume of business, but upon the amount of commissions earned by the appellant. In principle the case at bar and Ficklen v. Shelby County Taxing District, 145 U. S. 1, are indistinguishable.

The sales made through the sales representatives of the appellant in other states were Washington contracts. The activities of those sales solicitors in other states did not transform appellant's business into interstate commerce [fol. 30] so as to exempt appellant from payment of the occupation tax of which it complains. See Hopkins v. United States, 171 U. S. 578, and Blumenstock Bros. v. Curtis Publishing Company, 252 U. S. 436.

We repeat, that if the sales and shipments of the Washington fruit by the owners to points without the state constituted interstate commerce, it does not follow that the serv-

ices performed by the appellant, as agent or contractor, are so connected with the interstate transactions as to make those services a part of the interstate commerce. Any effect, at most, of such services upon interstate commerce is but remote, indirect and incidental; therefore, such activities of appellant as agent or contractor are within the state's legitimate taxing power.

The judgment is affirmed.

Millard, J.

We concur: Holcomb, J. Beals, J. Blake, J. Geraghty, J. Simpson, J.

[fol. 31] IN SUPREME COURT OF WASHINGTON

No. 26793

DISSENTING OPINION

ROBINSON, J. (dissenting):

I dissent from the foregoing opinion because I think the majority are in error both as to the facts presented in the case and as to the principles of law applicable thereto. The factual error appears most prominently in the following pivotal excerpt from the opinion:

"* * * The appellant is a domestic corporation *operating, entirely within this state,* a business which is exclusively with his principals, certain fruit growers; and for its services to its principals the appellant is paid a commission as recited above. * * *" (Italics mine.)

The complaint alleges, and the demurrer admits, that the appellant is engaged in the business of distributing Washington grown apples and pears throughout the states of the Union, and in a number of foreign countries; that it maintains sales representatives at many points outside the state of Washington who at such points negotiate said sales and execute written contracts of sale "on behalf of the appellant." The appellant's compensation is fixed at so much per box, that is to say, it is calculated per unit of volume.

It further alleges:

"That as a further part of its business plaintiff handles the bills of lading on all shipments made in compliance

with the contracts of sale entered into in foreign and extra-state territory, most of said shipments being consigned to the plaintiff at extra-state points, and that through its foreign and extra-state representatives plaintiff attends to the delivery of said shipments and collects the proceeds therefrom which are thereafter forwarded to the plaintiff at Seattle, Washington, all in the course of interstate and foreign commerce."

All of these allegations (except, of course, the last nine words of the quotation) are admitted by the demurrer. I do not see how the majority can rightly say that these allegations describe a concern operating "entirely within this state." To me, it pictures a far-flung business, actively [fol. 32] operating in many of our sister states, and in a number of foreign countries, in distributing Washington grown apples and pears throughout the channels of trade, a concern which, however, has, for quite understandable reasons of convenience, chosen to incorporate itself and maintain its head office in the state of Washington, the source of the product which it is engaged in distributing.

That interstate and foreign commerce is not confined to transportation of goods from one state to another or from one country to another, but comprehends, in addition, all commercial intercourse between states and countries and all activities necessary to its accomplishment, is so elementary that the citation of judicial decisions so holding would be superfluous. It is obvious that the mere carriage or transportation of the Washington fruit to New York, Philadelphia, or Boston, or to London, Paris, or Rome, would be futile unless someone performed the various services with relation to the shipments which the appellant alleges it performs. Without these services the commerce involved could not be accomplished. Nor do I perceive any distinctive difference between the nature of the services performed by the appellant and the services performed by the railroad company which carries the fruit across the country, or the steamship company which carries it overseas.

As to the fruit growers, both the appellant and the transportation company are independent contractors. The appellant's services are paid for, not by a commission upon the value or sale price of the fruit, but are calculated per unit of volume. The transportation company's compensation is, to a large extent, directly proportionate to weight

[fol. 33] and volume. The services performed by each are services necessary to the commerce involved. Upon what theory, then, is it cheerfully admitted on the one hand that a tax upon the transportation costs (the freight) would be a direct burden upon interstate or foreign commerce, and hotly contended on the other hand that a tax upon the other equally necessary and inescapable distribution costs is not!

The fact is that, although the opinion of this court in Puget Sound Stevedoring Company v. Tax Commission of the State of Washington was reversed on November 8th last by the Supreme Court of the United States, — U. S. —, 58 S. Ct. 72, 88 L. Ed. Adv. Op. 64, its erroneous reasoning is by the majority again made the basis of decision in this case. In that case, the court held the compensation of the stevedoring company taxable because (1) earned wholly in a local business; and (2) carried on by an independent contractor. In this case, the majority attempts to fit the facts to (1) of that formula by reducing the appellant's status to that of a mere commission merchant performing a merely local service, and this is done notwithstanding the broad admissions of the demurrer to the contrary. Having done that to their satisfaction, the majority proceed to apply the exploded and discredited "independent contractor" theory originally announced in the reversed Puget Sound Stevedoring Company case, and thus arrive at their decision.

As justification for this rather strong language, I quote the following excerpt from the very heart of the majority opinion:

"* * * Appellant renders an independent service—engages in a business within this state— * * *."

And lest this be insufficient to prove the point, I quote [fol. 34] from that portion of the opinion which states the actual decision in the case:

"* * * it [the appellant] is merely a local agent for growers and associations in this state who have fruit to be sold. If those fruit growers and associations choose to make sales through the medium of an agent or independent contractor, as in the case at bar, the agent's or contractor's activities in this state in making and promoting the sales are subject to state taxation like any other local business."

The last sentence in the above quotation constitutes the decision in this case. It does not meet the test of either

reason or authority. The fruit growers made a contract with the appellant in which the appellant agreed to render, for so much per box, certain services in connection with exchanging their fruit for the money of consumers in other states and countries. Let it be assumed that they at the same time also made a contract with a railroad to perform the actual carriage required by this commerce. Would the railroad be any less an independent contractor than the appellant? If not, and no other answer is possible, could its compensation under its contract be taxed? The answer is no, even though it is an independent contractor—for such a tax would be a burden upon interstate and foreign commerce. Neither can the compensation of the appellant be taxed if its compensation is received for services rendered in interstate and foreign commerce. The nature of the service is wholly decisive, and whether or not it is rendered by an independent contractor has nothing whatever to do with the matter.

I do not pursue this subject further because, in the first place, it is vain to labor overmuch in attempting to establish the obvious, and, second, the question has been settled by authority binding upon this court. In reversing the judgment of this court in the Puget Sound Stevedoring [fol. 35] Company case, supra, the Supreme Court of the United States said, less than three months ago, that the judgment was

"* * * placed upon the ground that the taxpayer was an independent contractor engaged in a local business,"

and, speaking through Mr. Justice Cardozo, disposed of the "independent contractor" theory in the following words:

"The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. *What is decisive is the nature of the act, not the person of the actor.*" (Italics mine.)

The rationale of the majority opinion is, therefore, clearly unsound. I think the result is also. Whether it is or not wholly depends upon whether or not the appellant renders a foreign and interstate commerce service, as has been indicated at the beginning of this dissent. I think that

the complaint alleges facts which show that it does render such services in other states and in foreign countries, services indispensable to the accomplishment of the commerce involved, and some of them not differing in character from the services rendered by the carrier which transports the fruit.

The majority say that the appellant's business is entirely carried on in this state, and that it is in no sense interstate in character. But when it is admitted that the appellant, acting through its representative, which is the only way a corporation can act, calls on a dealer in New York or London, negotiates a sale of Washington fruit, makes a contract in its own name, and, subsequently, personally attends to the delivery and collection of the proceeds, I need more than I find in the majority opinion, and more than I think can be found anywhere else, to convince me that these acts are performed in the state of Washington, or that the collection of the freight, for example, is an act in any way differing in nature from a transportation company's col-
[fol. 36] lection on a C. O. D. shipment.

In my opinion, the rule or judgment appealed from should be reversed.

Robinson, J.

We concur: Main, J. Steinert, C. J.

[fol. 37] IN SUPREME COURT OF WASHINGTON

No. 26793. Thurston County No. 16434

GWIN, WHITE & PRINCE, INC., a Corporation, Appellant,

vs.

HAROLD H. HENNEFORD, THOMAS S. HEDGES and T. M. JENNER, Constituting the State of Washington Tax Commission, Respondents

JUDGMENT—March 14, 1938

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 14th day of March, A. D. 1938, on motion of G. W. Hamilton, Attorney Gen-

eral, of counsel for respondents, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said Harold H. Henneford, et al., as State of Washington Tax Commission have and recover of and from the said Gwin, White & Prince, Inc., and from National Surety Corporation, surety, the costs of this action taxed and allowed at Fifty Three and 55/100 ($53.55) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 38] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR—Filed April 8, 1938

The petitioner and appellant assigns the following errors in the records and proceedings in this cause:

I

The Supreme Court of the State of Washington by its judgment erred in failing to hold that the operations of the appellant in selling and distributing throughout foreign states and countries, and collecting the sale price of, fruit grown in the State of Washington, form an essential and component part of Interstate and Foreign Commerce.

II

The Supreme Court of the State of Washington by its judgment erred in failing to hold that appellant is engaged solely in Interstate and Foreign Commerce.

III

The Supreme Court of the State of Washington by its judgment erred in holding that the imposition upon and collection from the appellant of the business and Occupation Tax (Chapter 191, Laws of Washington 1933, as amended by Chapter 57, Laws of Washington Extraordinary Session 1933, and Chapter 180 Laws of Washington 1935) upon its gross income, is not a tax or duty laid upon [fol. 39] articles exported from the State of Washington

in violation of Article I, Section 9, Clause 5 of the Constitution of the United States.

IV

The Supreme Court of the State of Washington by its judgment erred in holding that the imposition upon and collection from the appellant of the said Business and Occupation Tax upon its gross income does not constitute an impost or duty on exports in violation of Article I, Section 10, Clause 2 of the Constitution of the United States.

V

The Supreme Court of the State of Washington by its judgment erred in failing to hold that the imposition of the said Business and Occupation Tax upon appellant's gross income is an unlawful and illegal burden, hindrance, and obstruction upon Interstate and Foreign Commerce in violation of Article I, Section 8 of the Constitution of the United States.

VI

The Supreme Court of the State of Washington by its judgment erred in affirming the judgment of the Superior Court of Thurston County, Washington, denying the injunctive relief against the imposition and collection of the said Business and Occupation Tax upon appellant's gross income and in dismissing the action filed by the appellant and granting judgment in favor of the appellee.

VII

The Supreme Court of the State of Washington by its judgment erred in failing to grant to appellant the relief sought in this action and in failing to grant judgment in its favor.

Wherefore, on account of the errors hereinabove assigned [fols. 40-66] petitioner prays that the said judgment of the Supreme Court of the State of Washington, dated the 14th day of March, 1938, in the above-entitled cause be reversed and judgment be rendered in favor of this appellant.

Dated this 7th day of April, 1938.

Carl E. Croson, Ofell H. Johnson, Counsel for Appellant.

[File endorsement omitted.]

[fol. 67] Filed in Clerk's Office Supreme Court State of Washington, Apr. 8, 1938. Benj. T. Hart, Clerk

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IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Chief Justice of the Supreme Court of the State of Washington:

Your petitioner, Gwin, White & Prince, Inc., a corporation, respectfully shows:

That your petitioner is the appellant in the above entitled cause; that on February 3, 1936 your petitioner filed its complaint against the appellee above named in the Superior Court of the State of Washington for Thurston County alleging that a statute of the State of Washington, to-wit, The Business and Occupation Tax (Chapter 191 Laws of Washington 1933, as amended by Chapter 57 Laws of Washington Extraordinary Session 1933, and Chapter 180 Laws of Washington 1935, being Sections 8370-4 to 8370-15 inclusive, of Remington's Revised Statutes of the State of Washington, 1937 pocket supplement) which purports to impose a tax or excise upon the gross receipts of the petitioner for the privilege of engaging in the State of Washington in the business of marketing and delivering, as agent for growers and grower organizations in those states, apples and pears produced in the States of Washington and Oregon, is repugnant to and in conflict with Section 10 of Article I of the Constitution of the United States, in that said tax or excise constitutes an impost or duty on exports; and likewise is repugnant to and in conflict with Section 8 of Article I of the Constitution of the United [fol. 68] States in that said tax or excise constitutes an illegal interferance with interstate and foreign commerce.

Equitable grounds were alleged and the issuance of an injunction was requested against the appellees above named enjoining the enforcement of said Business and Occupation Tax against petitioner. Thereafter a demurrer to appellant's complaint, alleging said complaint did not state facts sufficient to constitute a cause of action, was duly filed by

appellees and the case was presented to the Honorable Judge of the Superior Court of Thurston County, the parties stipulating in writing that the Court might decide the case on the merits on defendant's demurrer and it being further stipulated in writing that appellant transacted its entire Washington State business under written contract with The Wenatchee-Okanogan Cooperative Federation, copy of which contract was attached to the said stipulation. At the conclusion of the hearing on the demurrer, the demurrer was sustained and on May 26, 1937 the order sustaining the demurrer to appellant's complaint was entered, together with judgment and decree of court denying the prayer of plaintiff's complaint and dismissing the action with costs, petitioner excepting to said judgment and decree and its exception being allowed.

An appeal from said final judgment and decree dismissing the action was taken to the Supreme Court of the State of Washington. The Supreme Court of the State of Washington, after a departmental hearing and a rehearing en banc, on February 9, 1938, affirmed the action of the lower Court, and final judgment was entered on March 14 denying the petitioner relief and affirming the dismissal of the action. The opinion of the Supreme Court in its entirety dealt with the question of the validity of The Business and Occupation Tax as applied to appellant, in respect to the constitu- [fol. 69] tion of the United States and found that said statute in its application to petitioner is not in conflict with or repugnant to Article I, Section 9 or Article I, Section 10, or the Commerce Clause of the Constitution of the United States.

Therefore, in accordance with Section 237-a of the Judicial Code (28 U. S. C. A. 344), and in accordance with the Rules of the Supreme Court of the United States your petitioner respectfully shows this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to-wit, under Section 237-a of the Judicial Code (28 U. S. C. A. 344), a review could be had in the Supreme Court of the United States on an appeal (writ of error) as a matter of right. The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States, and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of

the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Supreme Court of the State of Washington, the highest Court of said State in which a decision in this case can be had, to the Supreme Court of the United States in order that the decision and final judgment of the said Supreme Court of the State of Washington may be examined and reversed, and also prays that a transcript of the records, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of the State of Washington, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States as provided by law, and that an order be made, adjudging the security to be required of the petitioner, and that the cost bond tendered by the petitioner be approved.

Carl E. Croson, Ofell H. Johnson, Attorneys for Petitioners.

[fol. 70] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed April 8, 1938

The petition of Gwin, White & Prince, Inc., a corporation, the appellant in the above-entitled cause, for an order allowing an appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Washington, having been filed with the Clerk of this Court and presented herein, accompanied by an assignment of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the Records in this cause having been considered; it is hereby

Ordered that an appeal be, and it is hereby allowed to the Supreme Court of the United States of America from the final judgment, dated the 14th day of March, 1938, of the Supreme Court of the State of Washington as prayed in said petition, and that the Clerk of the Supreme Court of the State of Washington shall within sixty days from this date make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein which shall

be designated by praecipe and stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States; it is further

[fol. 71] Ordered that said appellant shall give a good and sufficient cost bond in the sum of One thousand Dollars; that said appellant shall prosecute said appeal to effect and answer all costs, if it fails to make the plea good.

Dated this 8th day of April, 1938.

William J. Steinert, Chief Justice of the Supreme Court of the State of Washington.

[File endorsement omitted.]

[fols. 72-74] Supersedeas bond on appeal for $1,000.00 approved and filed April 8, 1938, omitted in printing.

[fols. 75-78] Citation, in usual form showing service on G. W. Hamilton et al., filed April 8, 1938, omitted in printing.

[fol. 79] In Supreme Court of the United States

[Title omitted]

Stipulation as to Transcript of Record—Filed April 8, 1938

It is hereby stipulated between Gwin, White & Prince, a corporation, appellant above named, and the Tax Commission of the State of Washington and Harold H. Henneford, Thomas S. Hedges, and T. M. Jenner, members of said Commission, the appellee above named, by and through their respective counsel, as follows:

That the Clerk of the Supreme Court of the State of Washington, is hereby instructed to prepare the record on appeal in the above entitled cause, and that the following papers shall be included in and shall constitute said record on appeal:

1. Complaint.
2. Stipulation and Exhibit "A" thereto.
3. Demurrer.
4. Memorandum opinion of the Superior Court.
5. Order of Superior Court sustaining Demurrer dated May 26, 1937.
6. Judgment of Superior Court dated May 26, 1937.
7. Notice of appeal to the Supreme Court of the State of Washington.
8. Assignments of error on appeal to the Supreme Court of the State of Washington.

[fol. 80] 9. Order of the Supreme Court of the State of Washington assigning the above entitled cause for rehearing en banc.

10. Opinion of the Supreme Court of the State of Washington and dissenting opinion thereto.

10a. Judgment of the Supreme Court of the State of Washington.

11. Assignments of error on appeal to the Supreme Court of the United States.

12. Statement as to jurisdiction with attached copy of the decision of the Superior Court of Thurston County and the Supreme Court of the State of Washington.

13. Petition for appeal.

14. Order allowing appeal and fixing cost bond.

15. Cost bond.

16. Citation.

17. Statement directing attention to United States Supreme Court Rule 12.

18. Proof of service of papers required by United States Supreme Court Rule 12.

18a. Appellants statement of points to be relied upon and designation of parts of the record to be printed.

19. Stipulation for transcript on appeal.

20. Clerk's certificate.

Dated this 7th day of April, 1938.

Carl E. Croson, Ofell H. Johnson, Counsel for Appellant. G. W. Hamilton & R. G. Sharpe, Counsel for Appellee.

[File endorsement omitted.]

[fol. 81] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 82] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED.—Filed May 31, 1938

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record as filed is necessary for the consideration of the case.

Dated this 7th day of April, 1938.

Carl E. Croson, Ofel H. Johnson, Counsel for Appellant.

Due and timely service of the foregoing "Appellant's Statement of Points to be Relied Upon and Designation of Parts of the Record to be Printed" acknowledged this 8th day of April, 1938.

G. W. Hamilton & R. G. Sharpe, Counsel for Appellee.

[fol. 83] [File endorsement omitted.]

Endorsed on cover: File No. 42,560. Washington Supreme Court. Term No. 75. Gwin, White & Prince, Inc., appellant, vs. Harold H. Henneford, Thomas S. Hedges and T. M. Jenner, Constituting the State of Washington Tax Commission. Filed May 31, 1938. Term No. 75, O. T., 1938.